Competition Compliance 2020

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LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Bulgaria, Mexico, Norway and Romania.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Peter Crowther of Winston & Strawn LLP, for his continued assistance with this volume.

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United Kingdom

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GENERAL

General attitudes

1 | What is the general attitude of business and the authorities to competition compliance?

According to research by the Competition and Markets Authority (CMA), 77 per cent of businesses still do not understand competition law well, and only 6 per cent of UK businesses run any competition law training at all. This is despite the fact that according to the CMA's research, 79 per cent of businesses regularly meet with rivals.

The CMA uses a variety of strategies to raise awareness and promote compliance through its activities, which include the publication of a number of guides, blogs and other materials to educate businesses, and sector-based activities.

Government compliance programmes

2 | Is there a government-approved standard for compliance programmes in your jurisdiction?

The CMA advocates a risk-based approach to competition law compliance, tailored to the activities of the business in question. Underpinning the approach is a clear and unambiguous 'top down' commitment to competition law throughout the business.

The CMA recommends the adoption of a four-stage approach, namely:

- identify the key competition law risks;
- analyse and evaluate the seriousness of risks;
- set up policies and procedures to reduce the likelihood of identified risks occurring; and
- review efforts regularly to ensure an effective culture of compliance.

Applicability of compliance programmes

3 | Is the compliance guidance generally applicable or do best practice and obligations depend on company size and the sector of the economy it operates in?

The CMA's compliance guidance is generally applicable, and accordingly, the approach advocated does not mandate specific actions that must be taken, but rather an approach that identifies business-specific risks and appropriate and proportionate measures.

4 | If the company has a competition compliance programme in place, does it have any effect on sanctions?

The existence of a compliance programme is not enough to warrant an automatic reduction in sanctions. The existence of a compliance programme may even be treated by the CMA as an aggravating factor in exceptional cases (ie, where it conceals or facilitates breaches or otherwise misleads the CMA).

In determining penalties, the CMA will consider whether there is evidence that adequate steps have been taken to achieve a clear and unambiguous 'top down' commitment to compliance. Such evidence may be taken into account in granting a possible reduction of fines of up to 10 per cent and in any decision to impose a director disqualification order.

IMPLEMENTING A COMPETITION COMPLIANCE PROGRAMME

Commitment to competition compliance

5 | How does a company demonstrate its commitment to competition compliance?

Commitment to compliance may take different forms. One example is making a public statement regarding a commitment to compliance on the UK business's websites. Other measures include board resolutions affirming the business's commitment to compliance, audits and internal compliance investigations, the adoption of a competition compliance code for employees, and employee-focused compliance training.

Any compliance programme will be expected to include appropriate steps relating to the four-stage approach to compliance recommended by the Competition and Markets Authority (CMA).

Risk identification

6 | What are the key features of a compliance programme regarding risk identification?

Key features of risk identification normally include those listed below.

- Employee risk – are they aware of competition law? Do they come into contact with competitors? Do employees frequently move between competing businesses? Do they seem to have information about competitors' prices or activities?
- Agreements with competitors – are competitors also customers or suppliers? Is there any partnership with competitors? Are there any agreements with competitors that contain requirements to share commercially sensitive information?
- Business practice – does the company have significant market shares on any market? Does the business impose resale restrictions on retailers?

Risk assessment

7 | What are the key features of a compliance programme regarding risk assessment?

Once identified, risks can be assessed in terms of their seriousness. The CMA suggests UK businesses do so qualitatively (low, medium or high). Businesses should pay particular attention to employees in high risk areas of the organisation (sales, marketing or other target-related roles) or who are likely to be in contact with competitors.

In addition, or alternatively, risk assessment could be predicated upon the financial impact on the business should a breach occur. The assessment should evaluate the reputational consequences of an infringement-related investigation, or those that flow from fines or criminal sanctions.

Risk mitigation

8 | What are the key features of a compliance programme regarding risk mitigation?

Key features of compliance risk mitigation will depend on the risks. They include:

- competition law training for high-risk employees;
- implementation of codes of c:onduct, checklists and manuals;
- establishment of a system for logging all contact with competitors;
- making available before-the-event legal advice for employees;
- implementation of confidential reporting; and
- making breaches of competition compliance a disciplinary matter.

Compliance programme review

9 | What are the key features of a compliance programme regarding review?

The CMA recommends that UK businesses review and monitor their compliance programmes regularly to ensure effectiveness. This may be annually or less frequently, depending on the business. There may also be occasions where a business reviews its competition compliance programme outside its review cycle, such as on the commencement of a competition investigation in that sector or on the acquisition of a competitor.

DEALING WITH COMPETITORS

Arrangements to avoid

10 | What types of arrangements should the company avoid entering into with its competitors?

Chapter 1 of the Competition Act 1998 prohibits agreements, decisions and concerted practices between or among undertakings or associations of undertakings that have as their object or effect the restriction, distortion or prevention of competition within the UK and that affect trade within the UK.

The prohibition applies to agreements entered into between companies that are active horizontally (at the same level of the supply chain) and also vertically (at different levels of the supply chain).

The types of arrangements that will be caught include (but are not limited to) price-fixing, bid rigging, market sharing and the limiting of production or output.

Exemptions are available either through block exemptions or because the individual agreement has certain pro-competitive efficiencies.

At least until the end of December 2020 (the current envisaged end of the Brexit transition period), the Competition and Markets Authority will also be empowered to apply the similarly worded EU prohibition under article 101 of the Treaty on the Functioning of the European Union (TFEU).

Suggested precautions

11 | What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

The precautions that can be taken to manage competition law risks will depend on the type of arrangements that a company is entering into with a competitor. In general, a good compliance programme will help mitigate risk by ensuring that employees are aware of what to do and not to do when dealing with competitors. In terms of meetings, steps that can be taken to try and manage risk include agreeing an agenda and adhering to it, reading a reminder at the start of the meeting and having a legal adviser present. Minutes should be taken, reviewed and agreed following the meeting.

Within the context of other agreements, companies should consider whether collaboration is necessary. If the aims cannot be achieved independently, the scope of the collaboration should be carefully set and procedures put in place to limit information sharing to only what is essential. This may require firewalls or clean teams. Reviews of the arrangement should be carried out, and a record of the company's assessment of the basis for the arrangements kept.

CARTELS

Cartel behaviour

12 | What form must behaviour take to constitute a cartel?

Cartel activity concerns agreements or concerted practices that infringe article 101 of the TFEU or the Chapter I prohibition and typically involve companies engaging in price-fixing, bid rigging, the establishment of output restrictions or quotas or market sharing or market dividing arrangements. Cartels are considered the most serious violations of article 101 and Chapter I and often operate through secret meetings or covert contacts between participants.

Cartels have as their object the prevention, restriction or distortion of competition and, therefore, the actual effects of the activity are irrelevant. Implementation is not necessary; intention to implement is sufficient.

Avoiding sanctions

13 | Under what circumstances can cartels be exempted from sanctions?

There are exemptions where agreements or concerted practices contribute to improving production or distribution or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, but do not impose on the undertakings concerned restrictions that are not indispensable to the attainment of those objectives or afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

It is, in principle, possible for a cartel to be exempt on the above basis; however, it will be very difficult for a cartel to fall within this exemption. The burden of proof is on the company seeking to rely upon the exemption.

There is limited immunity from financial penalties for agreements between undertakings whose combined turnover does not exceed £20 million. This does not apply to price-fixing agreements. This may be withdrawn by the CMA if, as a result of its investigation, it considers that an agreement is likely to infringe the Chapter I prohibition.

Exchanging information

14 | Can the company exchange information with its competitors?

There are circumstances in which companies can exchange information with their competitors without breaching competition law. However, information exchanges can breach competition law where they lead to a reduction in strategic uncertainty. This will depend on the circumstances of each individual case, including the type of information exchanged and the structure of the market to which it relates. Information on current and future prices, quantities, costs and demand is likely to be considered strategic information the disclosure of which might have an appreciable

effect on competition, whereas the sharing of historic or aggregated data is less likely to have an appreciable effect on competition.

In December 2016, the CMA fined Balmoral, a supplier of steel water tanks, for taking part in an exchange of competitively sensitive information on prices and pricing intentions. The exchange took place at a single meeting at which Balmoral was invited to join a long-running cartel to allocate customers and fix prices. Balmoral refused to take part but did exchange competitively sensitive information with its competitors. In 2019, the Court of Appeal upheld the CMA's judgment.

LENIENCY

Cartel leniency programmes

15 | Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

The Competition and Markets Authority (CMA) runs a leniency programme, which is available to undertakings and individuals who have participated in cartel activity.

Leniency in relation to vertical arrangements is limited to price fixing (eg, resale price maintenance) unless the vertical arrangement might be said to be facilitating horizontal cartel activity.

Leniency applicants must meet a number of conditions, including admission of participation, provision of all non-legally privileged information, maintenance of continuous and complete cooperation and termination of participation. The applicant must also not have taken steps to coerce another undertaking to participate (for immunity applicants).

Different types of leniency are available, as follows.

- Type A is available to the first applicant to report a cartel when there is no pre-existing investigation. This provides total immunity from fines, together with blanket immunity from criminal prosecution for all cooperating directors and employees as well as protection for directors from disqualification proceedings.
- Type B is available to the first applicant to report a cartel when the CMA is conducting a pre-existing investigation. This provides discretionary immunity from fines or reductions up to 100 per cent, discretionary immunity from criminal prosecution for cooperating directors and employees (either blanket or for specific individuals) and protection from director disqualification proceedings (automatic if leniency or immunity is granted).
- Type C is available in circumstances where another undertaking has reported the cartel activity or where the applicant was a coercer. This provides discretionary reductions in fines up to 50 per cent, discretionary immunity from criminal prosecution for specific individuals and protection from director disqualification proceedings (if a leniency reduction in fines is granted).

16 | Can the company apply for leniency for itself and its individual officers and employees?

Leniency is available to undertakings and individuals who have participated in cartel activity. In practice, applications from undertakings (on behalf of the undertaking and also its directors and employees) are more common than applications from individuals.

17 | Can the company reserve a place in line before a formal leniency application is ready?

The CMA operates a system whereby an applicant can obtain a marker that preserves an applicant's place in the queue for immunity or leniency. The information that must be provided for a marker includes: the identity of the applicant and emerging details of the cartel, including the affected product markets, geographic scope and dates; evidence that has been uncovered which is sufficient to give a 'concrete basis' for suspicion of cartel activity; and the names and locations of other involved parties. The marker is preliminary pending consideration of the full application package and operational from the moment that the applicant's identity has been disclosed.

Whistle-blowing

18 | If the company blows the whistle on other cartels, can it get any benefit?

Where an undertaking that is cooperating with an investigation by the CMA in relation to cartel activity in one market (the first market) is involved in completely separate cartel activity in another market (the second market), the primary benefit from whistle-blowing will be immunity from financial penalties and, where the applicant qualifies for Type A or B immunity, criminal immunity for all its cooperating current and former directors and employees as well as protection from director disqualification. To the extent that the undertaking is not benefiting from immunity in relation to the first market, there is a potential secondary benefit available for a Type A or B immunity applicant in the second market, which is a reduction in the financial penalties imposed on it in the first market, in addition to the reduction it would have received for cooperation in the first market alone. This is known as 'leniency plus'.

The level of discount depends on a number of factors, including the scale of consumer detriment involved in the additional reported cartel, the amount of effort taken by the immunity applicant to investigate the additional cartel, and the likelihood that the CMA would have uncovered the additional cartel in any event.

DEALING WITH COMMERCIAL PARTNERS (SUPPLIERS AND CUSTOMERS)

Vertical agreements

19 | What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

A variety of restraints might appear in the context of a vertical agreement that may be subject to enforcement. These include resale price maintenance, selective distribution, exclusive distribution, non-compete or exclusive dealing, tying and bundling and quantity forcing. Whether they will breach competition law will depend on the nature of the restraint and the market position of the parties. For example, fixing minimum resale prices will be considered a restriction of competition by object, with no need to consider its effects, whereas for other types of restraint, an analysis of the effects will be required.

20 | Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

A distinction is made between restrictions of competition 'by object' (where no anticompetitive effect is required to be shown) and restrictions of competition 'by effect'. In principle, neither category of restriction is incapable of individual exemption, although in practice, demonstrating that an object restriction meets the criteria for exemption is very difficult.

21 | Under what circumstances can vertical arrangements be exempted from sanctions?

The EU Vertical Block Exemption Regulation (VBER) creates a 'safe harbour' for vertical agreements falling within its terms. An agreement

is exempt from the Competition Act if it is exempt from the prohibition in article 101 of the Treaty on the Functioning of the European Union because it falls within the scope of an EU block exemption. After the end of the Brexit transition period, the EU block exemptions will be preserved in national law.

To fall within the scope of the VBER, parties to an agreement must, inter alia, be operating at different levels of the supply chain for the purposes of the agreement and fall within certain market share thresholds, and the agreement must not contain hardcore restrictions of competition (restrictions of competition 'by object').

If a vertical agreement does not benefit from exemption under the VBER, it may still be capable of being individually exempt.

HOW TO BEHAVE AS A MARKET DOMINANT PLAYER

Determining dominant market position

22 | Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

The assessment of dominance follows a two-step process.

First, the Competition and Markets Authority (CMA) defines the relevant market that could be affected by the unilateral action of a dominant firm. Then, there is an assessment of whether the firm in question has market power within that defined market, which is assessed as the ability to profitably sustain prices above competitive levels or restrict output or quality below competitive levels.

Dominance is fact-dependent on each case. Market shares within the relevant market will often be the most significant indicator of a dominant position. The CMA applies a rebuttable presumption that undertakings with market shares of 50 per cent and over are dominant.

Abuse of dominance

23 | If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

Holding a position of dominance in itself is not a breach of competition law. Abuses of dominance occur when a dominant firm engages in conduct that exploits its dominant position unjustifiably, or eliminates or deters future entry by a competitor, and has the likely effect of restricting the degree of competition.

Similarly to the prohibition in article 102 of the Treaty on the Functioning of the European Union, the Chapter II prohibition of the Competition Act contains examples of specific types of conduct that may constitute an abuse of dominance. These fall into two broad categories: exploitative abuses (eg, imposing unfair purchase or selling prices) and exclusionary abuses (eg, applying dissimilar conditions to similar transactions).

In late 2019, the Competition Appeal Tribunal dismissed a major appeal by Royal Mail against Ofcom's finding that Royal Mail abused its dominance by engaging in a price discrimination strategy through the introduction of differential prices for bulk mail operators to access Royal Mail's final delivery service, without which they could not operate.

24 | Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

No formal exemption applies, although conduct of a dominant firm will not be considered abusive if it is objectively justified (ie, reasonable in the protection of its commercial interests) and proportionate to those objectives.

The CMA is not able to impose financial penalties on dominant undertakings whose turnover does not exceed £50 million. No equivalent immunity provisions exist under the EU competition rules.

COMPETITION COMPLIANCE IN MERGERS AND ACQUISITIONS

Competition authority approval

25 | Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

The UK operates a system of voluntary merger notification (even where the transaction meets the jurisdictional thresholds). Approval is not generally required to close a proposed transaction. The Competition and Markets Authority (CMA) monitors non-notified merger activity and may send an enquiry letter to seek further information to ascertain jurisdiction.

The CMA has jurisdiction to review a transaction where there is a relevant merger situation. A relevant merger situation will arise where:

- two or more enterprises have ceased or will cease to be distinct;
- the jurisdictional thresholds are met; and
- the transaction has not yet taken place or took place within the past four months.

There are two alternative jurisdictional thresholds. The threshold is met for the:

- turnover test if the annual UK turnover of the enterprise being taken over exceeds £70 million; and
- share of supply test if the transaction results in one enterprise having a share of supply of goods or services of any description of at least one-quarter in the UK or a substantial part of the UK. The merger must result in an increment to the share of supply.

Where the enterprise being taken over is a relevant enterprise (an entity active in the development or production of items for military or military and civilian use, quantum technology and computing hardware), the thresholds is met for the:

- turnover test if the relevant enterprise's annual UK turnover exceeds £1 million.
- share of supply test if before the merger, the relevant enterprise being acquired or merged has a share of supply or purchase of at least one-quarter in the UK or in a substantial part of the UK.

There is no requirement that the share of supply increases as a result of the merger.

A merger notice may be submitted by any person carrying on an enterprise to which the notified arrangements relate (in practice it is usually the acquirer).

26 | How long does it normally take to obtain approval?

Pre-notification

The CMA encourages pre-notification discussions, which typically last a minimum of two weeks.

Phase 1

The CMA has an initial period of 40 working days for its Phase 1 investigation, which begins on the first working day after it confirms that it has received a complete merger notice or sufficient information to begin an own-initiative investigation.

Following the 40-working-day period, there is an opportunity for parties to consider undertakings in lieu of a Phase 2 reference.

Phase 2

At Phase 2, the CMA is subject to a statutory deadline for publication of its final report – 24 weeks from reference. The period can be extended only once, by up to eight weeks (if the CMA considers there to be special reasons why a report cannot be prepared and published within the 24-week deadline).

If the CMA concludes that the merger would give rise to a substantial lessening of competition and that remedial action should be taken, there is a 12-week statutory deadline for the implementation of remedies (subject to extension).

Time periods may be extended where the parties have failed to provide requested information.

Cases can be fast-tracked for referral to Phase 2 (where the parties wish this to happen and there is sufficient evidence to meet the threshold for reference).

27 | If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

The Chapter I prohibition does not apply to merger agreements or 'any provision directly related and necessary to the implementation of the merger provisions'.

In considering ancillary restraints, the CMA will generally follow the approach set out in the European Commission's 'Notice on restrictions directly related and necessary to concentrations'. The CMA will not normally give a view in its decision regarding the nature of a restraint. The CMA may agree to provide guidance in exceptional cases, where the request raises novel or unresolved questions giving rise to genuine uncertainty.

Failure to file

28 | What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

There are no penalties for failure to file or any prohibition on companies completing transactions without clearance. However, the CMA can review non-notified transactions as part of an own-initiative investigation.

Parties that do not intend to notify should consider: the possible impact and consequences of an interim order being imposed by the CMA during an own-initiative investigation; the risk of remedies, including divestment, being ordered; and the impact of not notifying on any Phase 1 review.

The recent *Tobii/Smartbox* acquisition was not notified. The CMA subsequently decided to open an own-initiative investigation, resulting in a decision that full divestiture of the acquired business was the only effective remedy. Tobii challenged the decision in the Competition Appeal Tribunal, which largely ruled in the CMA's favour. The CMA subsequently maintained its position regarding divestiture.

INVESTIGATION AND SETTLEMENT

Legal representation

29 | Under which circumstances would the company and officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

The need for separate legal representation for a company and its officers or employees usually arises where there is a conflict of interest or a risk of one.

Any person being formally questioned or interviewed may request to have a legal advisor present. The person in question may choose to be represented by a legal adviser acting for the company under investigation, but the starting point of the Competition and Markets Authority (CMA) is that it would generally be inappropriate for a legal advisor only acting for the company to be present in the interview as there may, in certain circumstances, be a risk that the presence in an interview of a legal advisor acting for the business could prejudice the investigation.

Dawn raids

30 | For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

The CMA has the ability to, and in practice does, carry out dawn raids to obtain information. The CMA can enter business premises (either with or without a warrant) and domestic premises (with a warrant).

When the CMA enters premises without a warrant, it must usually do so having given notice. It may require persons to:

- provide relevant documents (including those stored electronically);
- provide an explanation of produced documents; and
- inform the CMA about a relevant document's location.

When the CMA enters premises with a warrant (mostly used for suspected cartels), the CMA may (in addition to the above):

- enter using reasonably necessary force if prevented from entering;
- search the premises for documents covered by the warrant (including those stored electronically); and
- seize documents (or copies) and take copies of electronic devices.

31 | What are the company's rights and obligations during a dawn raid?

An investigating officer entering premises must, upon request, allow a reasonable time for the occupier of a premise's legal adviser to arrive before continuing the investigation, although only if the officer considers it is reasonable to do so and where the officer is satisfied that any conditions he or she considers it appropriate to impose are being, or will be, complied with (conditions may include sealing filing cabinets, suspending external emails or calls and allowing the CMA to enter offices of its choosing).

Within the context of an investigation, a company has the right to withhold from disclosure any privileged communications. In the event of a dispute over privilege, the CMA may request that documents are placed in a sealed envelope pending resolution of the dispute.

A business also has the right to privilege against self-incrimination; in other words, the CMA cannot force a business representative to provide answers that would require an admission that the company has infringed the law.

Settlement mechanisms

32 | Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

Where the CMA has started an investigation, it may accept commitments to address its competition concerns. Commitments are binding promises in respect of future behaviour and may be structural or behavioural.

Acceptance of commitments is at the CMA's discretion. The CMA is only likely to do so where the competition concerns are readily identifiable and will be addressed by the commitments. Where commitments are accepted, the CMA will not continue its investigation or make an infringement decision.

Settlement is a possibility in any case falling within the Chapter I or Chapter II prohibitions. Settlement offers a streamlined administrative

procedure and a reduction in the fine (in addition to any fine reduction for leniency). The amount of the discount will be up to 20 per cent for settlement before a statement of objections is issued and up to 10 per cent after. Whether a case is suitable for settlement is a decision for the CMA.

Settlement requires a company to, inter alia, admit liability in relation to the nature, scope and duration of the infringement; cease the infringing behaviour (to the extent it has not done so); and confirm it will pay a penalty set at a maximum amount.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

Implementation or amendment of a compliance programme is not a precondition for settlement. In general, evidence of a company taking 'adequate steps' to improve compliance may lead to a discount in fine of up to 10 per cent.

Corporate monitorships

34 Are corporate monitorships used in your jurisdiction?

Appointment of a monitoring trustee is not uncommon in merger proceedings.

The CMA may require that a monitoring trustee be appointed to assess the extent of integration and make recommendations about how to mitigate the risk of pre-emptive action. The monitoring trustee will monitor and report on compliance with interim measures imposed by the CMA.

A monitoring trustee is much more commonly employed during Phase 2 investigations for completed mergers than during Phase 1 investigations. Monitoring trustees may be employed at Phase 1 where certain risk factors are present, such as substantial integration of the merging businesses prior to the imposition of interim measures.

Failure to comply with interim measures may lead to the CMA issuing directions or imposing a fine of up to 5 per cent of the company's turnover.

Statements of facts

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

In private damages actions, the EU Damages Directive and its implementing provisions make clear that in competition proceedings, a court or the Tribunal must not make a disclosure order in respect of a settlement submission that has not been withdrawn.

Settlement submission means a voluntary statement made, orally or in writing, to a competition authority by or on behalf of an undertaking that is made for the sole purpose of allowing the competition authority to follow a simplified or expedited procedure in connection with the infringement and which states that the undertaking either accepts that it has infringed competition law, or does not accept that it has infringed competition law but will not dispute a decision of the competition authority that it has done so.

Invoking legal privilege

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

Litigation privilege concerns confidential communications between a lawyer and client or a third party which came into existence for the dominant purpose of litigation, which is of reasonable prospect. Each case turns on its own facts. In *Tesco v Office of Fair Trading*, the Competition Appeal Tribunal held that once a statement of objections was issued, the investigation was no less adversarial than civil proceedings. In *Serious Fraud Office v Eurasian Natural Resources Corporation*, the Court of Appeal found, following a holistic view of the evidence, that documents created as part of an internal investigation following a whistle-blower's allegations of 'corruption and financial wrongdoing' were protected by privilege as criminal legal proceedings against Eurasian Natural Resources Corporation were reasonably in contemplation at the time.

Legal advice privilege concerns confidential communications between a lawyer and a client for the purpose of giving or obtaining legal advice or assistance. Under English law, the definition of 'lawyer' within the context of legal advice privilege is broad and includes both English qualified in-house counsel as well as lawyers in private practice. By contrast, the definition of 'client' is narrow. In the *Three Rivers* case, the Court of Appeal confirmed that the client is not the entire company but only the small group of individuals who have been liaising with the lawyer for advice. Therefore, communications between a lawyer and employees of the firm who do not fall within the definition of the 'client' are not protected by legal advice privilege.

The CMA cannot force a business to provide answers that would require an admission that it has infringed the law; however, it can ask factual questions, such as whether a particular individual attended a meeting. The CMA can also ask questions about documents already in existence or ask for their production.

Confidentiality protection

37 What confidentiality protection is afforded to the company or individual, or both, involved in competition investigations?

The CMA says that it 'aims to be reasonable when requesting and handling information, and to protect confidential information in a manner that is appropriate in the circumstances of the case'. In addition, the CMA is subject to the statutory obligations of the Enterprise Act 2002 to protect confidential information that comes to it in connection with the exercise of its statutory functions. However, the Act allows for the disclosure of specified information in certain circumstances.

In practice, those who participate in a CMA case will usually be given an opportunity to identify confidential information in documents before their disclosure into the public domain.

Refusal to cooperate

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

The CMA has various powers to impose penalties for failure to comply under both the Enterprise Act (in relation to markets or mergers investigations) and under the Competition Act, including failures to attend interview or provide documents. The CMA may impose administrative penalties as it considers appropriate (subject to statutory maxima, which depend on the nature of the failure to comply).

In addition, certain acts may also give rise to the risk of committing a criminal offence either in the context of merger investigations or in Competition Act investigations (eg, where a person intentionally alters, suppresses or destroys requested documents or knowingly or recklessly provides false or misleading information).

Infringement notification

39 Is there a duty to notify the regulator of competition infringements?

There is no general duty imposed on companies to notify of competition infringements. By way of exception, there may be specific

obligations to do so within certain sectors (under rules laid out in the Financial Conduct Authority's Handbook).

Limitation period

40 | What are the limitation periods for competition infringements?

There are no limitation periods for public enforcement of competition law.

Limitation periods for private enforcement of competition law infringements are generally six years (although there are exceptions). In line with the Damages Directive, the limitation period for a competition claim begins with the later of:

- the day on which the infringement ceases; and
- the claimant's day of knowledge – which is the day the claimant first knows or could reasonably be expected to know of the infringer's behaviour – that the behaviour constitutes an infringement; that the claimant has suffered loss or damage arising from that infringement; and of the identity of the infringer.

The limitation period may be suspended in certain circumstances, including during an investigation by a competition authority.

MISCELLANEOUS

Other practices

41 | Does your competition regime specifically regulate anticompetitive practices that are not typically covered by antitrust rules?

Companies should be aware of any sectoral regulation that may impose certain duties. In addition, companies should be mindful of the state aid regime, which prohibits, in general terms, a transfer of resources from the public sector to the private sector unless otherwise permitted.

Future reform

42 | Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

The UK's departure from the European Union will, once the transition period ends, lead to changes to the enforcement of competition law in the United Kingdom.

The Competition and Markets Authority (CMA) has published guidance ('UK exit from the EU: Guidance on the functions of the CMA under the Withdrawal Agreement 28 January 2020') that is designed to explain how the exit from the European Union affects the CMA's powers and processes for competition law enforcement as well as merger control and consumer protection law enforcement during, towards the end of and after the end of the transition period. The guidance also explains the treatment of 'live' cases (cases that are being reviewed by the European Commission or the CMA during and at the end of the transition period). Further guidance is anticipated in due course.

Although the process of enforcement is likely to be affected, the effect on competition compliance requirements is unlikely to be material.

UPDATE AND TRENDS

Key developments of the past year

43 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Following the publication of its new guidance on competition disqualification orders in February 2019, the Competition and Markets Authority (CMA) has increased its use of its director disqualification powers. Between 2003, when the ability to seek disqualification was introduced, and the end of 2018, the CMA only disqualified three directors. However, in April 2019, the CMA announced that it had secured disqualification undertakings from two former directors for their participation in a price-fixing cartel for certain concrete drainage products. In January 2020, the CMA commenced director disqualification proceedings against two directors for participation in the same cartel. Separately in May and July 2019, the CMA announced that it had secured a further six disqualifications of current and former directors of office fit-out companies for their involvement in a cartel.

In January 2020, the CMA imposed its first ever penalty notice for non-compliance with an information request in relation to a market study.

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